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No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Kansas

BRIEF OF AMICUS CURIAE WASHINGTON STATE PSYCHIATRIC ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 3

1. "MENTAL ILLNESS" IS NOT SYNONYMOUS WITH "MENTAL DISORDER"..... 3

2. NOT ALL SEX OFFENDERS SUFFER FROM A MENTAL DISORDER OR MENTAL ILLNESS..... 7

3. THE ACT IN QUESTION IS NOT INTENDED TO REQUIRE A FINDING OF MENTAL ILLNESS... 11

4. THE ACT IN QUESTION EMPLOYS UNSOUND CRITERIA..... 13

5. A "PARAPHILIA" IS NOT THE SAME AS MENTAL ILLNESS..... 19

CONCLUSION..... 22

TABLE OF AUTHORITIES

STATUTES: Page

K.S.A. 59-2901 3

K.S.A. 59-2902..... 12

K.S.A. 59-29a01..... 3

K.S.A. 59-29a02..... 13

CASES:

Foucha v. Louisiana, 504 U.S. 71 (1992)..... 19

Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995)..... 2

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INTEREST OF AMICUS CURIAE

The Washington State Psychiatric Association (hereafter the Association) is comprised of more than 500 qualified doctors of medicine specializing in psychiatry. Due to their training and experience diagnosing and treating mental disorders and mental illness, members of the Association frequently diagnose and/or treat persons who are the subject of involuntary commitment proceedings, including persons who have committed sexual offenses. The Association is familiar with criteria employed in the commitment of people suffering from mental illness, and with the scientific findings regarding sexual offenders.

Psychiatry is at the forefront of mental health knowledge. The psychiatric profession has produced the leading authoritative text on the diagnosis of mental disorders, namely, the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (1994). The psychiatric profession has also produced the leading authoritative text on the treatment of mental disorders, namely, *Treatments of Psychiatric Disorders* (1989). Organic methods to treat sex

offenders, such as the administration of Depo Provera, are studied and exclusively implemented by psychiatrists or other qualified physicians.

The Association is familiar with the Kansas statute at issue here, which is patterned upon a very similar statutory scheme enacted in the State of Washington. When the Washington statute was recently ruled unconstitutional by the United States District Court for the Western District of Washington, the court cited the amicus brief submitted by the Association as providing pertinent information. *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

The Association is deeply concerned about the harm caused by sexual offenders, and strongly supports proper efforts to protect the public from violent offenders of all kinds. Nevertheless, the Association has grave misgivings about the premises on which the above-mentioned statute is based, and about the consequences of implementing it.

The Association submits this brief so that the Court may have the benefit of current psychiatric knowledge and the

scientific evidence having a bearing on the issues before this Court.[1]

SUMMARY OF ARGUMENT

The Kansas Sexually Violent Predator Act, K.S.A. 59.29a01 (hereafter the Act) is fundamentally flawed because it allows the involuntary commitment of persons who are not mentally ill, and who therefore would not qualify for involuntary commitment under the Kansas involuntary treatment act, K.S.A. 59-2901, *et. seq.*

ARGUMENT

1. "Mental illness" is not synonymous with "mental disorder."

It is well accepted in modern psychiatry that "mental illness" requires, as a threshold determination, the existence of a mental disorder. A mental disorder is a "clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom." *Diagnostic and Statistical Manual* (Fourth Edition), published by the American Psychiatric Association, 1994, at p. xxiv (hereafter, the DSM-IV).

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1 The parties have consented to the filing of this amicus brief. A letter granting consent has been submitted to the Clerk.

Accurately labeling any individual as "mentally ill" involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder based on diagnostic criteria as set forth in an authoritative text such as the DSM-IV.

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment to a psychiatric hospital for treatment.

It must be emphasized that not all "mental disorders" found in the DSM-IV would be deemed by any competent mental health provider as constituting a "mental illness" as that term is ordinarily used in the context of civil commitment proceedings. Many and perhaps most of the mental disorders described in the DSM-IV would almost certainly **not** be regarded as a "mental illness" for purposes of involuntary commitment. Even a cursory review of the DSM-IV provides numerous examples of disorders which would rarely, if ever, be labeled as a mental illness; e.g., Male Erectile Disorder (p. 502);

Female Orgasmic Disorder (p. 505); Caffeine Induced Sleep Disorder (p. 604); Nightmare Disorder (p. 580); Nicotine Use Disorder (p. 243), to name but a few.

Simply put, it is extremely unlikely that anyone will ever be involuntarily committed because of nicotine addiction, for example. Any argument that "mental illness" and "mental disorder" are synonymous flies in the face of common sense and sound psychiatric practice.

What, then, is necessary for a diagnosis of "mental illness?" In the context of involuntary commitment, it is widely understood in the psychiatric profession that to be identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life. This understanding of mental illness derives from a comprehensive view of health and illness, as aptly explained by Robert F. Schopp & Barbara J. Sturgis in *Sexual Predators and Legal Mental Illness for Civil Commitment* (1995) at 444:

> A person is ill when his or her ability to function as a system is impaired by some

> pathological process of a biological or psychological subsystem. A person is mentally or psychologically ill when some pathology of psychological process impairs his or her ability to function at some previously defined level of psychological health in some intrapersonal or interpersonal aspect of ordinary life. Psychological processes such as perceptions, memory, comprehension, mood or reasoning are pathological if they fall significantly below the range of ordinary functioning.

Schopp & Sturgis further state (at 445):

> For the sake of clarity, we use "psychological impairment" or "psychological dysfunction" to refer to impairment of psychological processes including, for example, distorted thought process such as delusional thought, perceptual distortions such as hallucinations, or disturbed affect such as depressed mood.

See also Christopher Boorse, "Concepts of Health" in *Health Care Ethics*, 364-71 (Donald Van De Veer & Tom Regan, eds., 1987), and Michael Moore, *Law and Psychiatry*, 189-95 (1984), cited by Schopp & Sturgis.

Based on the foregoing, a person diagnosed as schizophrenic, for example, would be deemed to be mentally ill because schizophrenia is characterized by severely impaired cognitive or perceptual functioning, thus creating a substantial and enduring loss of contact with reality. A person with severely disturbed affect may also be deemed to be mentally ill. A major depression, for example, may be so severe as to impair a person's ability to survive.

In all instances of mental illness, the essential feature is a dysfunction or impairment of a psychological process which in turn substantially impairs a person's ability to function in everyday life. While all mental disorders will involve some degree of suffering or distress, most disorders do not involve an impairment of the type or magnitude necessary for a diagnosis of mental illness.

2. Not all sex offenders suffer from a mental disorder or mental illness.

Some sex offenders suffer from a mental disorder, and some are undoubtedly "mentally ill." However, the fact of being a sex offender does not, in itself,

imply a mental disorder or mental illness. Deviant behavior which is criminal does not in itself constitute a mental disorder:

> Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of dysfunction in the person, as described above.

DSM-IV, at p. xxii.

Numerous factors contribute to the conduct of sex offenders; e.g. poor socialization with respect to sexual mores, lack of impulse control due to alcohol, pressures to conform to expectations of peers. Their motivation for deviant behavior may include (for example) an expression of anger, a desire to control, or a desire to inflict suffering. Offenders can and do engage in wrongful conduct for reasons other than mental illness. *Encyclopedia of Crime & Justice*, Vol. 4 (1983) at 1486-1487. Many sex offenders offend only if they are in a situation conducive to a criminal act; i.e., an opportunistic setting.

Encyclopedia of Crime & Justice, supra, at 1489-1490.

The scientific findings concerning the underlying causes of sexual offending were recently summarized as follows:

> A great variety of psychiatric symptoms, cognitive deficits, social deficits, and histories have been reported to be characteristics of sex offenders. These characteristics include denial or minimization of offending, cognitive distortions about their victims, impaired control of anger or sexual impulses, substance abuse, poor assertiveness and social skills, absence of appropriate enjoyable activities, lack of sexual education, problems of intimacy, previous sexual traumatization, as well as deviant sexual arousal and preferences.
>
> ****
>
> Identifying characteristics of sex offenders does not establish the etiology of the behavior. It is typically not possible to determine the "cause" of sexual offending; most behavior, sexual or otherwise, is considered multiply determined.

Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually*

Violent Predators Statute, 15 U. Puget Sound L. Rev. 597, 601 (1992).

The foregoing facts are becoming increasingly well-recognized. The view that being a sex offender implies an identifiable mental illness or disorder has been widely rejected, as shown by recommendations to repeal laws premised on such a view:

> Growing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders has led such professional groups as the Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and most recently, The American Bar Association Committee on Criminal Justice Mental Health Standards to urge that these [sexual psychopath] laws be repealed.

See Samuel J. Brakel, John Parry and Barbara A. Weiner, *The Medically Disabled and the Law,* 3rd ed. (1985) at 743.

At least one national mental health organization whose members specialize in treating sex offenders also rejects the notion that deviant sexual behavior

constitutes a mental disease or illness. The Association for the Treatment of Sexual Abusers has published a "Practitioner's Handbook" which asserts (at p. 1) that sex offenders have a learned behavioral disorder, not a mental "disease."

> Sexual deviance is a learned or acquired behavioral disorder. Treatment is focused on recognizing, changing and managing deviant behavior and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured.

3. The Act in question is not intended to require a finding of mental illness.

In its legislative finding stated in K.S.A. 59-29a01, the Kansas legislature announced its recognition that sexual offenders are not necessarily mentally ill:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et. seq. and amendments thereto....

The involuntary treatment act referred to by the Kansas legislature allows commitment of persons who are "mentally ill." Under K.S.A. 59-2902(h), a "mentally ill person" is any person who:

> 1. Is suffering from a severe mental disorder to the extent such person is in need of treatment;
>
> (2) lacks capacity to make an informed decision concerning treatment; and
>
> (3) is likely to cause harm to self or others.

The involuntary treatment act further defines "severe mental disorder" as:

> ...a clinically significant behavioral or psychological syndrome or pattern associated with either a painful symptom or serious impairment in one or more important areas of functioning and involving substantial behavioral, psychologic or biologic dysfunction. "Severe mental disorder" does not include a condition which is caused by the use of chemical substances or for which the primary diagnosis is antisocial personality.

K.S.A. 59-2902(o).

The definition of "severe mental disorder" found in the Kansas involuntary treatment act is consistent with the

psychiatric understanding of mental illness, summarized earlier.

The Kansas involuntary treatment act provides an effective means to protect the public from dangerous sex offenders who are also mentally ill. The aim of the Act at issue in this case, namely, the Kansas Sexually Violent Predator Act, is to allow involuntary commitment of sex offenders who are **not** mentally ill.

4. The Act in question employs unsound criteria.

As pointed out above, the Kansas legislature recognized the offenders it wishes to commit may not be mentally ill. Accordingly, the Act does not require a finding of mental illness. It is sufficient under the Act if the offender has a "mental abnormality" or "personality disorder." K.S.A. 59.29a02.

The term "mental abnormality" has no clinically significant meaning and has long been in disuse because the word "abnormal" has several meanings which differ in important ways. Webster's Third New International Dictionary (1986) defines "abnormal" as:

> 1. deviating from the normal...differing from the typical...2. greater than

> or superior to the normal...3. less than or inferior to the normal: deficient in intellectual powers: characterized by mental defect or disorder...4. departing from the accepted standards of social behavior....

In short, something that is "abnormal" could be desirable or undesirable, or could involve underlying mental processes or merely observable behavior, depending on the intended meaning of the user. Undoubtedly due to these ambiguities, "abnormality" is not a diagnostic or explanatory concept in authoritative texts such as the DSM-IV.

Because "mental abnormality" has no recognized clinical meaning, there is no way to assure it will be applied so that only persons who are mentally ill are subject to civil commitment. As stated by Wettstein, *supra*, at 602:

> "Mental abnormality" connotes sufficient vagueness that nearly any symptom, deficit, or historical detail might be included. "Mental abnormality" is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness. The definition is too broad and

> elastic to avoid improperly encompassing a wide variety of individuals....

In an effort to avoid the ambiguity inherent in the term "abnormality," the Kansas Legislature defined it in K.S.A. 59-29a02 as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses...."

The foregoing definition cannot provide meaningful guidance to mental health professionals, judges, or lay persons. Stripped to its barest essentials, "abnormality" was defined as something -- a "condition" -- which predisposes a person to commit sex crimes. Because all who are subject to the Act will have been charged with or convicted of a sex offense, the required predisposing condition will be defined by the acts which were committed. The result is a criterion which can be stretched to fit all sex offenders, whether mentally ill or not.

A virtually identical definition of "mental abnormality" was provided by the Washington legislature in the statutory scheme on which the Kansas act is

patterned. When the Washington statute was ruled unconstitutional, the District Court correctly observed that the "mental abnormality" criterion "has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals." The court further observed that the definition of "mental abnormality" provided by the legislature is tautological. *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

The Act also allows commitment on a finding of a "personality disorder." The concept of "personality disorder" has a clinically recognized meaning, and is explained in the DSM-IV at 630:

> Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of social and personal contexts. It is only when personality traits are inflexible and maladaptive and cause significant functional impairment or subjective distress that they constitute Personality Disorders.

It is apparent that a "personality disorder" is a shorthand way to describe or label a pattern of maladaptive

behaviors. Rarely if ever will an individual be deemed "mentally ill" for the purposes of civil commitment because of a personality disorder alone.

The DSM-IV describes no personality disorder which is peculiar to sex offenders. As a result, courts can expect efforts to invent such a personality disorder merely by labeling a pattern of sex offenses as a personality disorder, which is then diagnosed from this pattern of offenses. From this it is an easy step to assert that the sexual offenses are caused by the personality disorder. Although exercises of this type would satisfy the requirements of the Act, they are entirely circular. That is, a summary description of the offender's behavior is transformed into its cause.

The circularity of the "personality disorder" criterion was noted by the court in *Young v. Weston*, *supra* at 750, when finding the similar Washington statute to be unconstitutional:

> As with the concept of mental abnormality, the statute's use of "personality disorder" evokes a circular definitional structure in which the only observed

characteristic of the disorder is the predisposition to commit sex crimes.

To avoid inventing a personality disorder to fit the offense when implementing the Act, efforts may be made to rely on a DSM-IV diagnostic category labeled "Antisocial Personality Disorder." It may be argued that the presence of this category allows sex offenders to be labeled with a recognized "disorder."

There is little doubt that some sex offenders display features of an "antisocial personality" in that they have shown a "pervasive pattern of disregard for, and a violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." DSM-IV, at 645.

Courts should not allow commitment of persons who are characterized solely by an "antisocial personality," for two reasons. First, this criterion would allow use of our mental institutions for warehousing all "undesirables;" i.e., people who repeatedly show disregard for the rights of others.

Second, people characterized by an antisocial personality disorder are not

for that reason mentally ill. These are people for whom "deceit and manipulation" are central features, who "disregard the wishes, rights or feelings of others," and who "tend to be consistently and extremely irresponsible." DSM-IV at 645-646.

There is no evidence that persons with these traits suffer from a mental defect or impairment rendering them incapable of comprehending or conforming to societal norms. Instead, persons with these traits make choices reflecting a failure of moral development, probably stemming from early or middle childhood. See Leon Rappoport, *Personality Development: The Chronology of Experience* (1972), at 174-175, 244.

The larger community obviously deserves protection from people with the foregoing traits. It does not follow that protection should involve civil commitment. Rather, civil commitment should be reserved for the mentally ill.[2]

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[2] An antisocial personality disorder is not a "mental illness," and does not justify indefinite commitment in a mental institution. *Foucha v. Louisiana*, 504 U.S. 71 (1992). Note also that the Kansas involuntary treatment statute expressly prohibits commitment where "the primary diagnosis is antisocial personality." K.S.A. 59-2902(o).

It is sometimes asserted that sex offenders fall within the DSM-IV classification of "paraphilias." Paraphilia is characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons...." DSM-IV, at 522-523.

A diagnosis of paraphilia does not require the presence of deviant behavior, but may be based solely on sexually arousing fantasies or sexual urges. DSM-IV at 522-523. Many (and probably most) individuals who suffer from paraphilias, including pedophiles, find lawful outlets for their sexual deviance and do not commit crimes. *Encyclopedia of Crime and Justice*, *supra*, at 1490.

A sex offender who satisfies the criteria for a paraphilia is not for that reason mentally ill. As stated by Schopp & Sturgis, *supra*, at 451-452:

> Neither sexual assault nor the paraphilias, including pedophilia, entail psychological aberration apart from the desire to perform such conduct and the

> willingness to act on that desire. These desires may be socially deviant in that they are directed toward socially aberrant content, but they provide no evidence of impaired capacities. That is, the mere fact that some individuals experience and act upon such desires does not support the contention that these individuals suffer impairment of the capacities ordinarily available to most people for use in understanding the relevant social constraints and directing their conduct in light of these constraints. **Insofar as mental illness means a pattern of impaired psychological capacities, these defendants as a group demonstrate none.** (Emphasis added)

The foregoing conclusion is supported by the DSM-IV, which distinguishes the paraphilias from disorders widely recognized as involving impairments, such as "mental retardation, dementia, personality change due to a general medical condition, substance intoxication, a manic episode or schizophrenia," even though such conditions may lead to aberrant sexual behavior. DSM-IV, at p. 525.

aberrant sexual behavior. DSM-IV, at p. 525.

Stated differently, a person suffering from schizophrenia, for example, who also engages in aberrant sexual behavior would be deemed mentally ill by virtue of the severe cognitive impairment associated with schizophrenia. A person whose disorder is defined solely by aberrant sexual behavior would not be seen in the same light. In the absence of a cognitive, perceptual or affective impairment which severely limits the person's ability to function in ordinary life, a diagnosis of "mental illness" would not be warranted.

There is nothing in the DSM-IV to indicate that a paraphilia, without more, causes an impairment in everyday functioning which would justify a diagnosis of mental illness.

CONCLUSION

The Association is well aware of the harm caused by violent offenders, and recognizes the magnitude and complexity of the problem facing our legislatures and our courts.

The legislation now before this Court creates a harm arguably worse than the

harm it seeks to prevent, for several reasons. By allowing the involuntary commitment of persons who are not mentally ill, the legislation not only undermines the sound medical underpinnings of involuntary commitment, but also undermines our fundamental conception of liberty by advancing the practice of preventive detention. Legislation of this type diverts resources from the treatment of persons who are truly mentally ill, and further stigmatizes the mentally ill because it encourages the belief that violent sex offenders and the mentally ill have something in common because both are subject to involuntary commitment.

Violent sex offenders who represent a long-term threat to public safety should receive sentences commensurate with their crimes. It does not facilitate a sound and responsible use of psychiatric knowledge to incarcerate such offenders only briefly, and then seek to re-incarcerate them under the guise of "commitment."

Offenders who are truly mentally ill can and should be committed under the Kansas involuntary treatment act, K.S.A.

59-2901, a fact which was recognized by the Kansas legislature when it enacted the statute at issue here. It is precisely because sex offenders are typically **not** mentally ill that the legislature took the remarkable and unfortunate step that it did.

The decision of the Kansas Supreme Court, holding that the Act is unconstitutional, should be affirmed.

Respectfully submitted this 12th day August, 1996.

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